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8 CORPORACION NACIONAL DE
9 CONSUMIDORES Y USUARIOS DE
10 CHILE,
11 Plaintiff,
12 v.
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14 APPLE INC.,
15 Defendant.
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17 Case No. [5:18-cv-02527-EJD](#)
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**ORDER DENYING MOTION FOR
ATTORNEYS' FEES**

20 Re: Dkt. No. 34
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23 Plaintiff Corporacion Nacional de Consumidores Y Usuarios De Chile ("Conadecus") has
24 filed a motion for attorneys' fees, requesting an award of \$1,030,501.57 under California Code of
25 Civil Procedure § 1021.5. *See* Pls.' Mot. for Attorneys' Fees, ECF 34. In the alternative,
26 Conadecus requests leave to conduct discovery. *Id.* at 21. The motion has been fully briefed. *See*
27 ECF 36, 37. The Court finds this matter suitable for submission on the papers and without oral
28 argument pursuant to Civil Local Rule 7-1(b). For the reasons stated below, the motion is denied.

I. BACKGROUND

A. The Conadecus Suit is Consolidated into the MDL

Conadecus is a private non-profit organization with its principal place of business in Santiago, Chile. In April 2018, Conadecus brought the instant action against Defendant Apple Inc. ("Apple") on behalf of its members or constituents who are consumers in Chile. Conadecus alleged that Apple intentionally failed to inform customers that software updates for certain models of the iPhone were designed to slow the devices' processing speed to correct a battery defect. The Conadecus complaint asserts claims for trespass to chattels, unjust enrichment, and

1 fraudulent misrepresentation/omission. In June 2018, the Court consolidated the Conadecus
2 action into MDL proceedings and appointed Conadecus's counsel to serve as "International
3 Liaison Counsel" with responsibility for, among other things, monitoring any ongoing litigation in
4 any international courts.

5 **B. Another Consumer Organization Sues Apple in Chile: *Odecu* Action**

6 On December 24, 2018 (while the MDL was pending), a consumer organization in Chile
7 La Organización de Consumidores y Usuarios de Chile A.C. ("Odecu")—sued Apple's Chilean
8 subsidiary and local authorized distributors in Chilean court, asserting claims under Chilean law
9 on behalf of Chilean consumers ("the *Odecu* Action"). The *Odecu* Action centered on the same
10 factual allegations relating to iPhones that were the focus of the MDL. In accordance with
11 Chilean law, notice of the admissibility of the *Odecu* Action was published in May 2019, which
12 triggered a statutory period in which other plaintiffs and competing consumer associations may
13 join the proceedings.

14 Odecu filed the *Odecu* Action on its own in initiative and without the assistance of any
15 other consumer organization in Chile. ECF 36-4 at 2. Conadecus did not join or otherwise
16 participate in the *Odecu* Action. Nor did Conadecus ever inform the Chilean court of its pending
17 action against Apple in the United States.

18 **C. The MDL Settlement Resolves Claims of US Consumers, But Leaves Claims of
19 Chilean Consumers Unaffected**

20 In October 2019, counsel for Conadecus learned that the MDL plaintiffs were close to
21 reaching a settlement in principle. On February 28, 2020, Apple settled with U.S. consumers in
22 the MDL and filed its proposed settlement and release with a motion for preliminary approval of
23 the settlement. On March 20, 2020, Apple filed its Statement of Non-Opposition, which stated
24 that Conadecus and the named plaintiffs from South Korea are not included in the proposed
25 settlement.

26 On May 11, 2020, counsel for Conadecus emailed lead counsel for the MDL plaintiffs to
27 clarify the scope of the settlement. Counsel for Conadecus wanted the settlement documents

1 modified to make clear Conadecus was not settling. Lead counsel for the MDL plaintiffs
2 responded that “the proposed settlement does not prevent Conadecus from pursuing its claims.”
3 Mot. at 6. On May 12, 2020, counsel for Conadecus emailed lead counsel for the MDL plaintiffs
4 again to point out “problematic language” in the settlement documents. *Id.*

5 On May 27, 2020, this Court entered an Order Certifying Settlement Class and Granting
6 Preliminary Approval of Class Settlement.

7 On August 25, 2020, lead counsel for the MDL plaintiffs sent counsel for Conadecus
8 revised language for the Final Approval Order and Judgment. After more email exchanges and
9 motion practice, Conadecus was formally deconsolidated from the MDL.

10 **D. The *Odecu* Action Settles**

11 In March 2020, Odecu and Apple began to discuss a potential resolution of the *Odecu*
12 Action. In August 2020, the parties to the *Odecu* Action reached a settlement in principle. The
13 settlement was publicly filed in Santiago Civil Court on March 11, 2021, and was certified as final
14 and non-appealable on March 30, 2021.

15 **E. Final Approval of the MDL Settlement**

16 On September 18, 2020, when finalizing the settlement final approval papers for the MDL,
17 lead counsel for the MDL informed Apple that Conadecus’s counsel had identified drafting
18 ambiguities in the form of the proposed final judgment and proposed final approval order. On
19 November 30, 2020, Conadecus filed, but later withdrew, an “Administrative Motion for
20 Clarification of Proposed Final Approval Order and Proposed Final Judgment.” *In re: Apple, Inc.*
21 *Device Performance Litig.*, No. 18-md-2827, ECF 569. After discussing the issue, all parties
22 agreed to amend the proposed final judgment and proposed final approval order to clarify that the
23 Settlement Agreement does not release Conadecus’s claims.

24 On March 17, 2021, the Court granted final approval of the MDL settlement and on March
25 23, 2021, the Court entered judgment. The Court also granted in part the MDL plaintiffs’ motion
26 for attorneys’ fees and expenses, which resulted in Conadecus’s counsel receiving \$417,237 in
27 attorneys’ fees in his capacity as “International Liaison Counsel.”

1 **F. Counsel for Conadecus Learns of Odecu Settlement**

2 In mid-April 2021, Conadecus’s counsel learned of the settlement in the *Odecu* Action.
3 Conadecus’s counsel now seeks attorneys’ fees pursuant to California Code of Civil Procedure §
4 1021.5 as a purported “catalyst” for the settlement of the *Odecu* Action.

5 **II. DISCUSSION**

6 “Generally, litigants in the United States pay their own attorneys’ fees, regardless of the
7 outcome of the proceedings.” *Staton v. Boeing Co.*, 327 F.3d 938, 965 (9th Cir. 2003). The
8 exception, however, is when a statute provides for attorneys’ fees. One such exception is
9 California’s Private Attorney General Statute, which empowers courts to award attorneys’ fees to
10 a “successful party” in an action which has “resulted in the enforcement of an important right
11 affecting the public interest.” Cal. Code of Civ. Proc. § 1021.5. California courts have taken a
12 “broad, pragmatic view of what constitutes a ‘successful party’” for purposes of section 1021.5
13 and have explained that an attorney fee award may be justified even when plaintiff’s legal action
14 does not result in a favorable judgment. *Graham v. DaimlerChrysler Corp.*, 34 Cal.4th 553, 565-
15 66 (2004). In determining whether a plaintiff is a “successful party” under section 1021.5, “[t]he
16 critical fact is the impact of the action, not the manner of its resolution.” *Folsom v. Butte Cty.*
17 *Assn. of Gov’ts*, 32 Cal.3d 668, 685 (1982). The trial court “must realistically assess the litigation
18 and determine, from a practical perspective, whether or not the action served to vindicate an
19 important right so as to justify an attorney fee award” under section 1021.5. *Woodland Hills*
20 *Residents Assn. v. City Council*, 23 Cal.3d 917, 938 (1979). The catalyst theory is an application
21 of the above stated principle. *Id.* Under the catalyst theory, “an award of attorney fees may be
22 appropriate where ‘plaintiffs’ lawsuit was a *catalyst* motivating defendants to provide the primary
23 relief sought.”” *Graham*, 34 Cal.4th at 566 (quoting *Robinson v. Kimbrough*, 652 F.2d 458, 465
24 (5th Cir. 1981)).

25 Where, as here, a plaintiff does not “win a final judgment on the merits,” a court considers
26 three factors to determine whether the plaintiff nonetheless is the prevailing or “successful party”
27 for purposes of section 1021.2. First, the court must determine what the lawsuit sought to

1 accomplish and then determine whether it was accomplished by means of the suit. *Ass'n of Cal.*
2 *Water Agencies v. Evans*, 386 F.3d 879, 886 (9th Cir. 2004). A plaintiff need only have received
3 some of the benefits sought in the suit, but there must be “some sort of clear, *causal relationship*
4 between the litigation brought and the practical outcome realized.” *Id.* Second, a plaintiff must
5 show that the action had “some merit.” *Graham*, 34 Cal.4th at 561. Third, a plaintiff ordinarily
6 should have engaged in a reasonable attempt to settle the dispute prior to litigation. *Id.* The party
7 requesting attorneys’ fees bears the burden of establishing that it has met the requirements under
8 Section 1021.5. *Vosburg v. County of Fresno*, 54 Cal. App. 5th 439, 450 (2020).

9 The catalyst theory does not warrant an award of attorneys’ fees to Conadecus. First,
10 Conadecus was not a party, much less a “successful party” in the *Odecu* Action. Conadecus had
11 no involvement in the *Odecu* Action, and counsel for Conadecus did not even know about the
12 Chilean settlement until after it had been certified as final and nonappealable by the Chilean court.
13 Moreover, Conadecus offers no reason why California’s section 1021.5 would even apply to a
14 case filed in Chilean court, involving enforcement of Chilean consumer protection laws and
15 seeking redress for Chilean consumers. Conadecus has not identified any case in which a court
16 awarded attorneys’ fees under section 1021.5 for a lawsuit filed in another country that did not
17 result in a benefit to any individual in California.

18 Second, Conadecus is not a “successful party” in the *Conadecus* Action. The action
19 remains pending. Conadecus has no intention of dismissing the case and reserves the right to
20 amend the complaint and continue litigating. Thus, to date, Conadecus has yet to vindicate an
21 important right or achieve any other measure of relief for Chilean consumers as a result of the
22 *Conadecus* Action.

23 Third, Conadecus is not a “successful party” in the MDL. Conadecus’s theory—that its
24 role in the MDL had a catalytic effect that prompted Apple to settle the *Odecu* Action—is not
25 supported by the record. Conadecus asserts that its correspondence with lead counsel between
26 May 2020 through August 2020 was the catalyst for Apple to settle the *Odecu* Action. However,
27 Apple’s counsel was not included in the correspondence. The first time that Apple’s counsel
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1 interacted with Conadecus's counsel was in late 2020—well after Apple had reached a settlement
2 in principle with Odecu in August 2020. The sequence of events fails to establish the requisite
3 "clear, *causal relationship*"¹ between the actions taken by Conadecus's counsel in the MDL and
4 the settlement realized in the *Odecu* Action. In addition, Odecu confirms that it independently
5 reached the settlement with Apple without any participation or assistance from Conadecus. The
6 Court finds that Conadecus had no catalytic effect on either Apple or Odecu reaching a settlement
7 in the *Odecu* Action.

8 Fourth, Conadecus has not satisfied any of the other requirements in Section 1021.5. It is
9 premature to conclude that the *Conadecus* Action has "some merit." Conadecus also failed to
10 "first reasonably attempt to settle the matter short of litigation." *Graham*, 34 Cal.4th at 577.
11 Conadecus's claim of futility is unpersuasive, especially because Apple agreed to settle with
12 Odecu, a similarly situated Chilean consumer organization.

13 **III. CONCLUSION**

14 Conadecus's counsel has already been awarded \$417,237 in the MDL. An award of any
15 additional fees is not warranted. The motion for attorneys' fees is DENIED.

16 **IT IS SO ORDERED.**

17 Dated: February 25, 2022



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EDWARD J. DAVILA
United States District Judge

¹ *Ass'n of Cal. Water Agencies v. Evans*, 386 F.3d at 886.

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